United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-2191

No. 74-2191

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P/S

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

COMMUNICATIONS WORKERS OF AMERICA, et al.,

Plaintiffs-Appellants,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

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STATEMENT OF INTEREST

The United States Equal Employment Opportunity Commission (hereinafter "the Commission") is charged with the administration and enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. II, 1972) §2000e et seq. The Commission is filing the brief as amicus curiae directed to the issue presented in this appeal of whether the exclusion

of pregnancy-related disabilities from an employer's comprehensive disability benefits scheme violates Title VII's proscription against sex discrimination in terms and conditions of employment.

This issue, which involves the validity of the Commission's guidelines as to what constitutes sex discrimination under Title VII, is presently before two other United States Courts of Appeals in Wetzel v. Liberty Mutual Insurance Co., 372 F. Supp. 1146 (W.D. Pa. 1974), appeal pending Third Cir. No. 74-1233, and Gilbert v. General Electric Company, 375 F.Supp. 367 (E.D. Va. 1974), appeal pending Fourth Cir. No. 74-1557. The Commission is participating amicus curiae in both of those appeals.

ISSUES PRESENTED

1. Whether the exclusion of pregnancy-related disabilities from an employer's comprehensive disability benefits scheme violates Title VII's proscription against sex discrimination in terms and conditions of employment.

2. Whether, even under Geduldig v. Aiello, 94 S. Ct. 2485 (1974), the different treatment of pregnancy for purposes other than disability coverage is violative of Title VII.

STATEMENT OF THE CASE

The complaint in this action, filed July 31, 1973, alleged, inter alia, that defendant Telegraph Company, Long Lines Department (hereinafter, "AT & T" or "the Company") discriminates against its women employees by excluding pregnancy-related disabilities from its disability benefits plan which covers virtually every other disability (Appendix 15a). Defendant, in its answer, admitted that disability benefits are not paid by the Company for absences on account of disabling conditions attendant to pregnancy and childbirth (App. 27a).

Subsequent to the decision of the United States Supreme Court in Geduldig v. Aiello, 94 S.Ct. 2485, 8 FEP Cases 97, decided June 17, 1974 (App. 6a), District Court Judge Whitman Knapp, on his own motion indicated that he would receive briefs and hear oral argument on the issue of whether, in light of the Aiello decision, a motion to dismiss under F.R.C.P. 12(b)(6) should be granted. Oral argument was heard on this motion on July 11, 1974.

In an order dated August 2, 1974, the district court dismissed the complaint with leave to replead and certified

the question of whether the Aiello decision precludes this Title VII action on the ground that, absent a showing of pretext to discriminate, all pregnancy distinctions are non-discriminatory. CWA v. AT & T, Long Lines, 8 FEP Cases 529 (S.D. N.Y. 1974). This Court granted the petition for leave to appeal by order dated September 3, 1974.

STATEMENT OF FACTS

The American Telephone and Telegraph Company is a major employer of women. The Company entered into a settlement with the United States Equal Employment Opportunity Commission and the United States Department of Labor in 1971 after a series of public hearings before the Federal Communications Commission (FCC) during which the Equal Employment Opportunity Commission (EEOC) charged that the Company discriminated against women and minorities in virtually every facet of its employment policies.

The lawfulness of the Company's maternity policies was excluded from the points of agreement in the decree with the understanding that the legal issue would be resolved through litigation.

Through discovery the total maternity policies of the Company appear in the record. This shows special treatment of maternity in a number of respects.

1. Pregnant Applicants

At least until 1971, pregnant applicants who applied for jobs which required training or who, in the Company's estimation, would not be able to work a "reasonable length of time" prior to delivery, would not be hired although they may be encouraged to reapply when no longer pregnant (App. 112a).

2. Pregnancy Discharge

The Company concedes that from the effective date of the Act [July 2, 1965] until October, 1971, employees were at times discharged for being pregnant (App. 58a). Employees returning from pregnancy disability leave are even now not guaranteed reemployment (App. 105a).

3. Conditions of Reemployment

Prior to October, 1971 some employees returning from pregnancy disability leave were forced to take lower paying jobs (App. 61a). In addition, a woman returning to employment with the Company following a pregnancy leave must have the written approval of her physician or the Company's medical director (App. 68a), a condition of reinstatement

not imposed on employees returning from any other sort of disability.

4. Disability Coverage for Pregnant Employees

The pregnant employee is covered for non-pregnancy-related disability under the Company's disability benefits plan only while she remains on active duty status with the Company (App. 61a). Thus, as soon as the pregnant employee is on "leave" status, if she suffers a pulmonary embolism or a broken leg, totally unrelated to her pregnancy, she does so without the benefit of the Company's income protection program.

5. Seniority Accrual and Service Credit While on Pregnancy Disability Leave

Women on pregnancy disability leave do not accrue seniority or service credit after the first month of leave (App. 61a). In contrast, persons on military leave receive full service credit for the duration of their leave, and persons disabled by any non-pregnancy-related disability receive full seniority credit for the duration of their disability.

6. Death Benefits Denied Pregnant Employees

Persons on military leave who die are automatically entitled to death benefits from the Company for their

survivors; a woman on maternity leave who dies in childbirth or from related complications receives no such automatic entitlement.

7. Pregnancy Disability Exclusion

The purpose of the Company's disability benefits plan is to provide coverage for disabilities, not just those disabilities which can be described as sicknesses or accidents. In the words of Dr. Gilbeart H. Collings, the Medical Director of the New York Telephone Company, testifying at a deposition (App. 166a):

> There is a great confusion. . . as to the fact that we have a benefit plan which pays for a disease. This is not the case. We have benefits which are paid for disabilities and this is very hard to get across to everybody.
>
> . . .If you are disabled, no matter what the cause, with the exceptions that I have made which are not covered by the plan, you are entitled to benefits.

Dr. Collings further testified as to the factors which are considered in deciding whether a particular disability is justified. Those factors include (App. 183a):

1) Whether there is in fact a disability;

2) Whether the disability is sufficiently severe to prevent work;

3) Whether the employee has been accepting and obtaining adequate medical care;

4) The nature of the disability--whether covered by the plan.

The Benefits Secretary for the New York Telephone Company stated in deposition that the following conditions, if disabling, would be covered under the Company's benefits plan (App. 168- 176a): cosmetic surgery, vasectomies, menopause, treatment for alcoholism (i.e., "drying out"), acute drug overdose, lung cancer, chronic bronchitis, and attempted suicide.

ARGUMENT

INTRODUCTION

Disqualification from receipt of disability benefits for pregnancy-related disability is but one example of the numerous employment policies which have historically adversely affected women employees on the basis of their childbearing function or potential. The sexually discriminatory impact of the Company's exclusion of pregnancy-related disabilities from an employment benefits plan can be truly appreciated only when viewed in the context of the totality of employment practices which have relegated women to second-class employment status on the basis of their reproductive role.

1. At the very outset women have been subjected to hiring discrimination merely on the basis of their potential childbearing function. For example, in Wetzel v. Liberty Mutual Insurance Company, appeal pending 3rd Cir., No. 74-1233, Mari Ross, named plaintiff and class representative in the suit, initially filed her charge of sex discrimination on the basis of a pre-employment inquiry into her family-planning intentions.

In addition, in the instant case, AT&T has refused to hire women in advanced pregnancy or even in early pregnancy if the job for which they are applying requires training.[1/]

2. Employers have forced women to take leave at an arbitrary point in their pregnancies even though they were physically able to work. Gilbert v. General Electric Co., appeal pending, Fourth Cir. No. 74-1557, is illustrative. General Electric was found by the District Court to maintain a nationwide policy of forced maternity leave after the sixth month of pregnancy, although, absent complications, there is no medical reason for not allowing women to work to the day before delivery, or for limiting the woman's activity prior to delivery. It is now settled law that women cannot be forced off their jobs at some arbitrary and premature point in their pregnancies. Cleveland Board of Education v. LaFleur, __U.S.__, 94 S.Ct. 791 (1974).

1/ A Unique Competence: A Study of Equal Employment Opportunity in the Bell System, Equal Employment Opportunity Commission Report (1971). (App. 112a).

3. During the period of actual disability women are, as in this case, denied disability payments, even though every other form of disability is covered.

4. As in the instant case, a female employee seeking reinstatement after a maternity disability leave can be denied reinstatement if no opening exists for her because of a "change of operations" or "force surplus conditions". This is often applied even though employees returning from any other disability are guaranteed reinstatement. It is only the woman whose absence is due to pregnancy who finds her job jeopardized (App. 95a).

5. Women on maternity disability leave can be denied the accrual of service and seniority credit, thus rendering them more susceptible to lay-offs and subjecting them to diminished pension benefits. This is an employment policy of AT&T.

6. As in the present case, women returning from pregnancy disability leave are often required to have medical certification of their ability to return to work, although no such requirement is imposed on employees returning to their jobs from any other kind of disability leave.

tangential. There is ample evidence to indicate that

7. Employers have refused to employ unwed mothers while at the same time employing unwed fathers. Courts have held such a dual employment policy unlawful. Doe v. Osteopatic Hospital of Wichita, 333 F.Supp. 1357 (D. Kan. 1971); Andrews v. Drew Municipal Separate School District, 371 F.Supp. 27 (N.D. Miss. 1973), appeal pending Fifth Circuit No. 73-3177.

8. Companies have refused to employ mothers of preschool-age children while at the same time employing fathers of preschool-age children. This policy was held illegal in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

In sum, it is clear that if a woman's childbearing function in andof itself warranted differential treatment in the employment context, women would be forever locked into second-class status as employees.

If women can be denied employment because of pregnancy potential, forced off the job when pregnant, denied reinstatement following childbirth, refused disability benefits for pregnancy-related disabilities, and denied

employment because of maternal status, then Title VII holds out the promise of equal employment opportunity only to those women who, for whatever reason, are not now and cannot be mothers.

The decision in Gilbert v. General Electric Co., supra, held that Congress could not have intended such a result. Judge Merhige reasoned (7FEP Cases 796, 807):[2/]

> [I]t cannot be reasonably argued that Congress in its enactment of Title VII ever intended that an intended beneficiary of that Act forego a fundamental right, such as a woman's right to bear children, as a condition precedent to the enjoyment of the benefits of employment free of discrimination.

As noted, the Supreme Court has already decided that women cannot prematurely be forced off the job because of pregnancy or denied employment because they are mothers. The issue here is whether the failure to pay disability benefits for pregnancy—essentially just another facet of discrimination against women because of their childbearing function—is so different in character from these other practices that a different result should obtain. It is our position that, in light of the sexually egalitarian mandate of Title VII,

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2/ Skinner v. Oklahoma, 316 U.S. 535 (1942); Roe v. Wade, 410 U.S. 113 (1973); Buckley v. Coyle Public School System, 476 F.2d 92 (10th Cir. 1973).

the denial of disability benefits to pregnant workers is sex discrimination outlawed by the statute which cannot be justified by business necessity.

I. The standards for determining invidious discrimination under the Fourteenth Amendment differ from and are less stringent than the standards for determining discrimination under Title VII.

The Company argues that this Title VII action is governed by the recent decision of the Supreme Court in Geduldig v. Aiello, __U.S.__, 94 S.Ct. 2485, 8 FEP Cases 97 (June 17, 1974). However, Geduldig—a Fourteenth Amendment decision addressed to state action in a welfare benefits context—is distinguishable from this Title VII action arising in the private employment context.

The Supreme Court held in Aiello that it was not invidious sex discrimination under the Fourteenth Amendment for the State of California to choose not to include disabilities relating to normal pregnancy 3/ within its disability insurance program.

The heart of the Supreme Court's opinion in Aiello is footnote 20. There, the Court makes clear that it does not find that the policy at issue is non-discriminatory in the sense that women are not disparately

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3/ Thus, even under the Aiello rationale, AT&T's policy of excluding from its benefits plan complications of pregnancy and disabilities which, although unrelated to pregnancy, are experienced by the pregnant employee, after she is on leave status, is unlawful.

affected as compared to men, but rather that the resulting discrimination is not invidious. The Court stated (8 FEP Cases at 102):

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. (Emphasis supplied).

Thus, the Court concluded that the state's policy did not involve the kind of sex discrimination which it had previously held sufficient to subject state policies to strict scrutiny in Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973). Id., 8 FEP Cases at 101, n. 20. It did not involve such discrimination because the program at issue "divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."

The fact that such a policy does not violate the Fourteenth Amendment is not controlling under Title VII.

The Supreme Court has previously held that policies that penalize some, but not all or even most, women are discriminatory under Title VII and therefore must be justified under the ordinarily applicable Title VII standards. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). In Aiello, however, the Court held that a state may justify such practices under a standard—rational basis—which is considerably less stringent than those applicable under Title VII.[4/] Therefore the legal question presented by Aiello differs significantly from the issue before this Court.

The Fourteenth Amendment is concerned with the deliberate acts of a state. Those acts are assumed to be constitutional. Gibbons v Ogden, 9 Wheat. 1 (1824). Therefore, in order to prevail, the plaintiff has the burden of showing that a classification is not rationally related to a legitimate state policy; that the discrimination is deliberate; and that it is invidious. The Fourteenth Amendment does not strike down as illegal a policy which,

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4/ The pertinent Title VII standards are discussed infra at pp. 31-34.

while treating people differently, is reasonably related to a legitimate state interest.[5/] It was under these standards that the Court found that exclusion of pregnancy disability was reasonably related to certain legitimate state interests. The Court found that policy determinations based on several variables—the benefit level deemed appropriate, the risks to be insured, the maintenance of the solvency of the program, and the desired minimal personal hardships in terms of employee contributions to this completely employee funded insurance program—provided a rational basis for excluding normal pregnancy disability as a risk from the state's social welfare program.

5/ All the cases relied on in Aiello make a specific point of the fact that they arise in the social welfare context. The most recent of the three major cases discussed—Jefferson v. Hackney, 406 U.S. 535 (1972)—speaks directly to this issue:

"This Court emphasized only recently, in Dandridge v. Williams, 397 U.S. 471, 485 (1970), that in 'the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.' Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them." Jefferson, at 546-547. (Emphasis added).

However, Title VII directs itself not only to deliberate acts of employment discrimination but also to any unintentional act which has a disparate impact on a protected group. Motive is not a relevant factor under Title VII, since the statute is directed at the consequences of discrimination. Griggs v. Duke Power Co., 401 U.S. 242 (1971). Under Title VII, a policy which is neutral on its face is discriminatory if it has a disparate effect on a protected class. As the Supreme Court stated (401 U.S. at 431):

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.
> . . . The touchstone is business necessity.

See also Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974).

The approach under the business necessity standard is quite different from that applied under the Fourteenth Amendment. It is considerably more stringent than the rational relationship standard and does not involve a

balancing of interests. The question is whether the practice is "necessary to the safe and efficient operation of the business." Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971). See also United States v. N.L. Industries, Inc., 479 F.2d 354, 364-65 (8th Cir. 1973) and cases cited therein; Diaz v. Pan American World Air Ways Inc., 442 F.2d 385, 388 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971). In short, unlike the Fourteenth Amendment, Title VII grants no presumption in favor of the perpetrator of the policy; rather the employer is required to produce a defense for his action.

That Title VII standards are more stringent than the rational basis standard under the Fourteenth Amendment is not unusual. Courts and Congress have recognized the very real and logical differences in Title VII and Fourteenth Amendment standards. Congress, by extending coverage to states as employers in the 1972 amendments to Title VII, recognized that Fourteenth Amendment rational basis standards, to which the states were already subject as employers, were different from Title VII standards. Otherwise there would have been no point in extending Title VII coverage to the states.

The differences between Title VII and Fourteenth Amendment standards have been found by the courts to dictate different legal results. State protective labor laws restricting the amount of weight women can lift, the amount of hours women can work, or other conditions of women's employment, have traditionally been upheld under the Fourteenth Amendment.[6/] This result has been found by the courts to be required by the deference accorded the state's interest in regulating the health and safety of women. However, under Title VII, state maximum hours and weight-lifting laws for women, which have the effect of limiting their employment opportunity, have uniformly been struck down. Weeks v. Southern Bell Telephone & Telegraph Co., 467 F.2d 95 (5th Cir. 1972); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).

6/ In West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398 (1937), in upholding a state minimum wage law for women as protective legislation, the Supreme Court reasoned that:

"[T]imes without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

Another example of different results obtained under Title VII and the Fourteenth Amendment can be found in Goesaert v. Cleary, 355 U.S. 464 (1948), cited by the Dandridge v. Williams, 397 U.S. 471, 485 (1970), Supreme Court in its discussion of the rational basis standard under the Equal Protection Clause. In Goesaert the Supreme Court deferred to the state's interest in regulating moral and social problems to uphold, against an Equal Protection attack, its policy of limiting employment opportunity in bartending to women who were the wives or daughters of male bar owners. A contrary result is dictated by Title VII. The state would have to show that male sex was a bona fide occupational qualification necessary to the performance of the job, and this it could not do. See Krause v. Sacramento Inn, 479 F.2d 988 (9th Cir. 1973).

Indeed, one District Court has articulated the difference in Title VII standards and the rational basis standard in assessing the lawfulness of the specific employment policy confronting this Court—the failure to treat maternity disability on the same basis as other disability.

Citing the clarity of Title VII law on the question before him, Judge Frank Johnson reasoned that: "If this were being litigated under Title VII; Defendant's maternity leave policy would be unable to stand." Scott v. Opelika City Schools, 8 FEP Cases 272, 276 (M.D. Ala. 1974). The Court went on to strike down the policy under 42 U.S.C. §1983, but did so only because it was satisfied that the defendant had offered no rational justification for the rule. Implicitly, had a rational basis been demonstrated by the defendant, the state action could have survived under §1983 although it was concededly violative of Title VII.

The Court in Aiello stated: "[t]his Court has held that, consistent with the Equal Protection Clause, a State may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the other..." (Emphasis added.) In enacting Title VII Congress took the broad view that all forms of employment discrimination—on the basis of race, color, sex, religion and national

origin—should be abolished. Congress in other words, decided to cover the whole field rather than take one step at a time.

The Supreme Court stated in Aiello, as well as the cases cited therein, that the legislature can find the exclusion of certain classifications per se discriminatory and can choose to include this type of discrimination within its protective coverage.[7/] Applying the reasoning of Aiello, the same deference is due Congressional judgment in enacting Title VII as was due the state legislature in fashioning its welfare benefits program.

Congressional intent in enacting Title VII was to fashion broad remedial legislation directed to "one of the most deplorable forms of discrimination in our society, for it deals...with...the ability to provide decently for one's family in a job or profession for which he [she] qualifies and chooses." Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970). In passing the

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7/ See discussion at p.28, infra, of Congressional adoption of the Commission's interpretation that Title VII requires comparability of treatment for pregnancy disabilities and other disabilities in the employment context.

amendments to Title VII in 1972 Congress intended to provide those who most consistently face economic barriers in society—women and minorities—with real weapons for achieving equality in the work place.[8/] In fact, Congress has continued to legislate in order to redress the economic bondage of women in our society.[9/]

Finally, it must be borne in mind that the Supreme Court decision in Aiello is limited to the factual context of that case, that is, a state-operated welfare benefits scheme in which the employment context is

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8/ In 1970 while 40% of males in the work force earned over $10,000, and 70% over $7,000, 45% of women working full time earned less than $5,000, and 73.9% earned less than $7,000. U.S. Department of Commerce, Bureau of the Census: Current Population Reports, P-60, No. 80.

In 1972 the median income of women with four years of college was $8,736—exactly $100 more than the median income of men who had never even completed one year of high school. Table prepared by the Women's Bureau, Employment Standards Administration, U.S. Department of Labor.

9/ Implicit support for the proposition that Congress remained determined to launch a broad attack on sex discriminatory laws at the time of the passage of the 1972 amendments is found in Congressional passage of the Equal Rights Amendment forbidding the abridgement by states of any person's rights on the basis of sex, at approximately the same time—Spring, 1972.

tangential. There is ample evidence to indicate that a different result would obtain had the issue arisen in the direct employment context. Courts have consistently and unwaveringly held under both the Fourteenth Amendment and Title VII that women cannot be denied equality of employment opportunity and benefits on the basis of their reproductive function. Therefore, whatever the uniqueness of pregnancy for purposes of risk selection under a social insurance scheme, in the employment context it is directly comparable to any other disability.

For all the reasons stated above, the decision of the Supreme Court in Geduldig v. Aiello, 94 S.Ct. 2485, 8 FEP Cases 97 (June 17, 1974), is distinguishable from the instant action under Title VII.

II. The Company's exclusion of pregnancy-related disabilities from a disability plan which covers all other disabilities is discrimination based on sex in violation of Title VII.

Consistent with the Congressional mandate to place working women on an equal footing with their male co-workers, the Equal Employment Opportunity Commission, after carefully studying the policies which adversely affected working women for some seven years, published its Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.10, 37 F.R. 6835 (1972),[10/] contemporaneously with the enactment of the 1972 amendments to Title VII. These

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10/ The pertinent section of these guidelines, "Employment Policies Relating to Pregnancy and Childbirth," 29 C.F.R. §1604.10(b) states:

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

guidelines require that pregnancy-related disabilities must, for all job-related purposes, be treated the same as other disabilities under any health or temporary disability insurance or other sick leave plan available in connection with employment. Commission guidelines, which reflect the expertise of the agency mandated by Congress to enforce and implement Title VII, are entitled to great deference. Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971).

Congress understood and accepted the Commission's interpretation that failure to treat pregnancy-related disabilities on the same basis as other disabilities was violative of Title VII. More than a year prior to the passage of the 1972 amendments to Title VII and the publication of the Commission's guidelines (29 C.F.R. §1604.10(b)), Congress received annual reports from the Commission advising it of the Commission's position that disparate treatment of pregnancy under employment

disability plans was violative of Title VII.[11] Moreover, the Commission had issued published decisions reflecting this interpretation almost two years prior to the enactment of the 1972 amendments to the Act.[12] Had Congress disagreed with the Commission's interpretation it would have clarified this objection by a contrary definition in the 1972 amendments. Thus, there is ample evidence to support Judge Merhige's conclusion in Gilbert v. General Electric Co., 375 F.Supp. 367, 381 (E.D. Va. 1974)[13] that:

> The EEOC's construction, as enunciated in the guideline, is in accord with the will of Congress as expressed in the Act and its legislative history.

11/ See EEOC 5th Annual Report (year ending June 30, 1970), p. 14; EEOC 6th Annual Report (year ending June 30, 1971), p. 11-12.

12/ Commission decisions, which were commercially reported, indicated that as early as 1970 the Commission concluded that differential treatment of pregnancy-related disabilities by employers violated Title VII. See EEOC Decision No. 70-600, CCH EEOC Decisions ¶6122, March 5, 1970; EEOC Decision No. 71-308, CCH EEOC Decisions ¶6170, Sept. 17, 1970; EEOC Decision No. 71-562, CCH EEOC Decisions ¶6184, Dec. 4, 1970.

13/ See remarks of Senator Williams contained in the Senate Committee Report to the Equal Employment Opportunity Act of 1972 amending the 1964 Act:

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See also Wetzel v. Liberty Mutual Insurance Co., supra; Dessenberg v. American Metal Forming Co., 8 FEP Cases 290 (N.D. Ohio 1973); Hanson v. Hutt, No. 42826, (S.Ct. Wash. December 21, 1973). Contra, Newmon v. Delta Air Lines, 7 EPD ¶9154 (N.D. Ga. 1973).

13/ Cont'd

"In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization.... Experience has shown this view to be false.

"Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs.... It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially 'human' problem, and that litigation would be necessary only on an occasional basis... In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful." (Emphasis supplied.). (Senate Report No. 92-415, Calendar No. 412, p. 5).

III. The Company could not justify, under the appropriate Title VII standards, its policy of excluding pregnancy-related disabilities from its disability benefits plan.

Once disparate treatment of a protected class is shown, a Title VII defendant may attempt to justify the maintenance of its policy by establishing that the policy is required either by a bona fide occupational qualification (bfoq) or by business necessity. These defenses must be established by a Title VII defendant at trial, rather than be anticipated on the pleadings.[14/] However, since the Company has asserted a business necessity defense (App. 33a), a brief discussion of the pertinent legal standards is appropriate.[15/]

14/ See Pond v. Braniff Airways, Inc., 8 FEP Cases 659 (5th Cir. 1974), for a holding that a Title VII defendant cannot rely on a defense—in that case, the bfoq defense—without pleading and proof.

15/ No defense is raised under Sec. 703(e) of Title VII which provides that an employer may "hire and employ employees... on the basis of ...sex...in those certain instances where... sex... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular busines ...." This provision by its explicit wording allows an employer to discriminate on the basis of sex only in hiring and job assignment, and then only when it is necessary for the business to have an employee of one sex in such positions. The

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Business necessity is a judicially created defense to a policy which, although neutral on its face and in its intent, has discriminatory effects.[16] It is apparent that the differential treatment of pregnancy disabilities is not neutral. Therefore, the Gilbert Court correctly reasoned that (375 F.Supp. at 382):

> Primary, of course, is the principle that business necessity constitutes a valid defense only to a situation where the alleged discrimination arises from a policy neutral on its face, and in its intent. The instant case does not fall in this category.

However, even if business necessity were an available defense to this employment practice, the Company would have to establish that the practice in question is essential to

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15/ Cont'd

courts have applied the bfoq standard very narrowly. See, e.g., Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971). The bfoq defense is not applicable where, as in the instant case, there is no issue of whether it is necessary to hire men to perform adequately in a particular position.

16/ Examples of admittedly neutral employment policies which have failed to satisfy the business necessity standard include the following: multiple garnishments as a basis for discharge/racial impact, Wallace v. Debron Corporation, 494 F.2d 674 (8th Cir. 1974); use of arrest records as a bar to employment/racial impact, Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972); word-of-mouth recruitment/racial impact, Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).

the safety or efficiency of its operations. Robinson v. Lorillard Corporation, 444 F.2d 791 (4th Cir. 1971); Local 189, United Papermakers and Paperworkers v. U.S., 416 F.2d 980 (5th Cir. 1969); U.S. v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973).

AT&T argues that the cost of including pregnancy disabilities in its benefits plan rises to the level of a business necessity defense. However, courts have found that cost alone is not sufficient to establish a business necessity defense. Robinson v. Lorillard, supra; Jones v. Lee Way Motor Freight, 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971); U.S. v. St. Louis-San Francisco Ry. Co., 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973). As one court has stated succinctly, "...[D]iscrimination in employment cannot be tolerated, the expense or inconvenience in complying with the law notwithstanding." Johnson v. Pike Corporation of America, 332 F.Supp. 490, 496 (C.D. Cal. 1971).

Moreover, to successfully defend its policy the Company would have to satisfy the difficult three-pronged business necessity standard articulated by the Cour in Robinson v. Lorillard Corporation, 444 F.2d 791, 798 (4th Cir. 1971):

> ...The business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact.

This the Company could not do.

The Company's argument that paying disability benefits for pregnancy disability constitutes favored treatment of women was rejected by the Gilbert Court. Judge Merhige reasoned (375 F.Supp. at 383):

> Provision of a marginally greater economic benefit to women, if such it is, in the form of pregnancy disability benefits within an otherwise all inclusive disability program, cannot reasonably be considered more favored treatment. If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's biologically more burdensome place in the scheme of human existence. An industrial policy which does not account for this fails in providing such sexual

> equality as is within its power to produce. If Title VII intends to sexually equalize employment opportunity, there must be this one exception to the cost differential defense.

The argument that the payment of maternity disability benefits to female employees constitutes a special kind of severance pay to pregnant women is equally unpersuasive. The possiblity of non-return exists for all employees who are on disability leave. Moreover, if non-return is the problem, the Company could undoubtedly devise a means of dealing with the problem, perhaps by withholding a portion of the benefits until return. Non-return by some women is not a reason to deny benefits to those who do return and who, for the most part, are those employees who most need the money. 17/

17/ A publication of the United States Department of Labor, Employment Standards Administration, April 1973, entitled The Myth and the Reality, shows with striking clarity the ties between working women and today's labor market.

"[O]f the 33 million women in the labor force in March 1972, nearly half were working because of pressing economic need. They were either single, widowed, divorced or separated or had husbands who incomes were less than $3000 a year."

In 1973 there were more than 4.8 million working mothers with children under six. U.S. Dept. of Labor Employment Standards Administration, Women's Bureau, Twenty Facts on Women Workers (June 1974). It is reasonable to infer that a particularly high percentage of those women are working due to compelling economic necessity.

IV. Even under Geduldig v. Aiello, the Company's differential treatment of pregnancy for purposes other than disability coverage violates Title VII.

Paragraph 7 of plaintiffs' complaint alleges that the Company discriminates against women in matters such as "the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payments under health or disability insurance or sick leave plans". Thus, even if this Court were to find that Geduldig v. Aiello, 94 S.Ct. 2485 (1974) governs, this case, the Company's treatment of pregnancy contravenes Title VII in several significant respects. This conclusion is inevitable since the Supreme Court in Aiello was substantially concerned with the costliness of covering normal pregnancy disability, a factor which is not pertinent to these other policies. Giving that decision its broadest possible reach, it does no more than hold that disability due to normal pregnancy is sufficiently unique to justify its separate treatment in a disability benefits program. The Court did not hold that merely because a woman is pregnant a state or a company may treat that woman differently from other employees for all purposes. To do so would have overruled, sub silentio, its very recent

decision in Cleveland Board of Education v. LaFleur, ___U.S. ___, 94 S. Ct. 791 (1974), holding it irrational and contrary to due process to refuse to permit a woman to work because she is pregnant. See also the decision of this Circuit on that issue in Green v. Waterford Bd. of Education, 473 F.2d 629 (1973).

The Court in Aiello was obviously concerned with the costliness of covering the inevitable period of disability due to pregnancy. That is not a factor pertinent to the Company's other policies under attack here. Whatever may be said regarding the period of disability due to pregnancy, other matters, such as the right to return to work or the right to be covered for extraordinary illness, are not affected by whatever uniqueness may be attributable to pregnancy. It is thus discrimination to treat pregnant women differently from other workers in the respects detailed below.

A. Failure to Cover Complications of Pregnancy and Disabilities Unrelated to Pregnancy after Pregnancy Leave Begins

The state plan at issue in Aiello had been modified before the case reached the Supreme Court to cover disabilities due to complications of pregnancy, such as caesarian delivery and toxemia, and other conditions substantially unrelated

to pregnancy which occurred during pregnancy, such as diabetes. This was a recognition that abnormal conditions are like any other unexpected illness and are therefore not properly subject to special treatment. For this reason, A T & T's failure to cover complications of pregnancy once the pregnant employee is on leave status is violative of Title VII even under the Supreme Court's decision in Aiello.

Moreover, A T & T's exclusion from coverage of disabilites which are wholly unrelated to pregnancy, such as a broken leg or pulmonary embolism, simply because such disabilities occur fortuitously during the time that an employee is on maternity leave, subjects women to reduced benefits of employment. There is no realistic basis for such an exclusion.

B. Denial of Seniority Accrual and Service Credit While on Pregnancy Disability Leave

Women on pregnancy disability leave do not accrue seniority or service credit after the first month of leave (App. 61a). In contrast, persons on military leave receive full service credit for the duration of their leave, and persons disabled by any non-pregnancy-related disability

receive full seniority credit for the duration of their disability.

This policy ultimately affects the pregnant employee's significant employment interest by rendering her more vulnerable to lay-offs in the event of a recessive economy. In addition, the continuing detrimental effect of this policy will be felt by the affected employee many years hence since her pension benefits will be reduced to reflect the denial of service credit for this period of leave.

There is no business necessity justification for an employer's singling out pregnant women for this kind of inferior treatment.

C. Conditional Reinstatement of New Mothers

Employees returning from pregnancy disability leave are not guaranteed reemployment (App. 105a). No other kind of disability which could be experienced by an A T & T employee calls into question the affected employee's right to continued employment. No explanation for this policy can be imagined other than an attempt to discourage the employment of mothers of young children. It is established law than an employer cannot refuse to employ mothers of preschool age children while at the same time employing

fathers of preschool age children, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). A person who has been pregnant but is now fully recovered is in no different position from a man who has had an appendectomy and is now recovered. The disparate treatment is pure discrimination unjustified by any of the arguably unique factors which may be attributable to pregnancy.

D. Conditions of Reemployment

The requirement that a woman returning from pregnancy disability leave must have the written approval of her physician or the Company Medical Director in order to be reinstated is not imposed on employees returning from other types of disability leave (App. 68a). This condition is a patronizing intrusion of the employer into a medical decision, appropriately made by the woman in consultation with her physician, which the Company confines to new mothers. If the requirement has any legitimate basis, such as insuring employee health and safety, such a basis is as relevant to all employees returning from disability and not just those returning from pregnancy. Failure to treat pregnancy disability comparably with other disabilities in this respect

violates Title VII.

The district court therefore erred in dismissing the complaint in its entirety.

CONCLUSION

For all the reasons discussed above, it is respectfully submitted that the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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